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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ERICA E. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SHAWN E.,

Defendant and Appellant.

D052575

(Super. Ct. No. J512591A-B)

APPEAL from orders of the Superior Court of San Diego County, Cynthia
Bashant, Judge. Affirmed.

Shawn E. appeals an order denying his Welfare and Institutions Code section 388¹
petition in which he requested modification of previous orders that placed two of his
children, Erica E. and Alexander E. (Alex) (together, the children), with their mother,
Ruth S. He also appeals an order awarding sole legal and physical custody of the

¹ Statutory references are to the Welfare and Institutions Code.

children to Ruth, an order terminating juvenile court jurisdiction and an order denying his request for a continuance. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The children first became dependents of the juvenile court and were removed from parental custody in 1998 based on findings Shawn physically abused Alex and the parents exposed the children to domestic violence. (§ 300, subds. (a), (b), (j).) At the time, Erica was three years old and Alex was two. By the six-month review hearing, the court had ordered the children placed with Ruth. Shawn's visits became supervised after he grabbed Alex by the arm and left bruises.

During the next several years, services were provided to help Shawn and Ruth address their mutually acrimonious conduct, and the children participated in therapy designed to deal with issues caused by the parents' inappropriate parenting and their protracted custody dispute. In August 2001 the court continued placement with Ruth, terminated dependency jurisdiction, ordered joint legal and physical custody to Shawn and Ruth, with Ruth's home as the children's primary residence, and a visitation schedule for Shawn. Shawn and Ruth's custody battle subsequently continued in family court, resulting in the court awarding Shawn custody and Ruth unsupervised visits.

In March 2005 the San Diego County Health and Human Services Agency (the Agency) again petitioned in the juvenile court, alleging the children were suffering serious emotional damage as a result of the parents' contentiousness. (§ 300, subd. (c).) The court sustained the allegations of the petitions, removed the children from parental

custody, placed them in a licensed group home and ordered the parents to comply with their case plans.

At the 12-month review hearing, the court continued services for both parents although it found Shawn had made substantive progress with his case plan, but Ruth had not. The children remained in a group home. For the 18-month hearing, the Agency reported neither parent had gained insight into how they had contributed to the children's emotional turmoil. The children said they wanted to return to Ruth's custody, but the social worker recommended the court order another planned permanent living arrangement (APPLA) as the children's permanent plans, opining that placement with either parent would compromise the progress the children had made in treatment. At the 18-month hearing, the court terminated services for the parents, continued the children in out-of-home care, ordered APPLA as their permanent plans and gave the Agency discretion to allow unsupervised visits for both parents.

The social worker asked for discretion to place the children with Ruth for a 60-day visit because the children said they wanted to live with her. The court denied, without prejudice, Shawn's request for overnight visits, ordered his visits with the children be supervised by their stepmother and gave the Agency discretion, with concurrence of the children's counsel, to allow a 60-day visit with Ruth. It renewed this order at the July 30, 2007, postpermanency review hearing.

After the children began their 60-day visit with Ruth, Shawn filed a section 388 petition for modification, seeking to have them returned to his custody or, alternatively, to have more services. At a hearing on September 25, 2007, the court summarily denied

the petition. The court vacated the children's permanent plan of APPLA and placed them with Ruth.

Shawn appealed and in a nonpublished opinion, this court affirmed the orders made at the 18-month hearing, including an order denying a request for a contested postpermanency review hearing, orders denying his request for overnight visits and giving the Agency discretion for a 60-day visit with Ruth and an order summarily denying his section 388 petition. (*In re Erica E. et al* (May 29, 2008, D051413).)

In a report dated December 3, 2007, the social worker recommended the children remain with Ruth and the court terminate jurisdiction. The children were adjusting to living with Ruth, her husband and three younger children, and the social worker concluded there were no protective issues remaining to justify continued juvenile court involvement. On December 17 Ruth requested Shawn's visits be supervised at a visitation center and that his telephone contact with the children be supervised.

Shawn petitioned under section 388 on January 4, 2008, requesting the court vacate the children's placement with Ruth, place them with him, allow Ruth only supervised contact and remand the case to the family court. He also filed a brief that included a list of prospective witnesses. On February 13 he filed a motion again challenging previous orders.

The hearing on Shawn's section 388 petition began on February 13, 2008. Shawn represented himself. He asked the court to continue the hearing because his witnesses were not present, requested the court issue subpoenas for the witnesses and asked for documents he had not received. The court ordered the parties to make the records

available and denied Shawn's request for a continuance, noting it was Shawn's, not the court's, responsibility to subpoena witnesses.

During the hearing, the court heard testimony from 11-year-old Alex, 12-year-old Erica, the Court Appointed Special Advocate (CASA) for the children, the CASA's supervisor, the social worker, Shawn's therapists, Ruth and Shawn.

Alex testified Shawn had been abusive and made him lie to therapists about Ruth. He denied he had been coached in his testimony and said he did not miss Shawn, but would be willing to have supervised visits. He testified he wanted to live with Ruth, and his life with her had improved since the case began. He blamed Shawn for the fact that the court continued to be involved in his and Erica's lives.

Erica testified she did not want anything to do with Shawn. She denied being told how to testify. She said Shawn had been abusive to her and to Alex and had told them what to say to their therapists. She said therapy had helped her, but she just wanted to forget what she had been through. She believed Ruth had changed since the case began, but Shawn had not changed, and she wanted him to admit what he had done to her and to Alex.

The CASA testified she once believed Shawn cared for Erica and Alex, but she had changed her opinion because he insisted on keeping the case going after the children said they did not want to live with him. She believed Ruth had worked hard to make a life for herself and the children, had made progress in therapy and had admitted her role in the family's problems. She did not believe Shawn had made any progress.

The social worker testified the children wanted to live with Ruth. She said they appeared happy and were doing well in school. Ruth had reenrolled them in therapy, and they were not showing any signs of mental illness or personality disorders.

Shawn's therapist testified a treatment goal for Shawn was to decrease his anxiety. He said Shawn had obsessive-compulsive traits which could interfere with his relationship with the children. He had no doubt that Shawn loved the children, but said Shawn desperately wanted a relationship with the children, was caught up in what he perceived as a fight for justice and did not realize the consequences to others. The therapist testified the children would tend to be loyal to the parent with whom they were living, and Shawn had trouble empathizing with them because he was hurt and angry they did not want to live with him.

Ruth testified she remembered seeing that on one psychological evaluation she was diagnosed as a sociopath with passive aggressive, narcissistic and personality disorders, and the evaluation said she was severely disconnected from her children. She said she had treated her problems through therapy and would support the children having a relationship with Shawn if they chose to do so. She testified she no longer became angry with Shawn, but she did not think he had changed. She wanted to move from California some day, but she said she would not use the move to deny Shawn contact with the children. She testified she had told the children she knew she had played a part in ruining their childhoods and now she wanted them to have normal lives.

Shawn testified he had once been close to the children, but Ruth had alienated them from him. He believed he had been a good parent and had done everything he was

asked to do. He said the record supports his position, and he had been unfairly deprived of the children. He said he had not been visiting because he was afraid visitation would result in false allegations against him. He stated he never hit the children. He did not believe Ruth had resolved her mental health issues and thought the children were not calling him because of pressure from her.

After considering the evidence, testimony and argument, the court denied Shawn's section 388 petition. It awarded custody of the children to Ruth. It ordered Shawn to have individual therapy and then conjoint therapy with the children when his therapist deemed him ready. The court then terminated juvenile court jurisdiction.

DISCUSSION

I. Denial of Shawn's Section 388 Petition

Shawn asserts the court erred by denying his section 388 petition. He argues he provided evidence of changes of circumstances and showed that removing the children from Ruth's custody and placing them with him would serve their best interests.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court [¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held"

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(e); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

The court did not abuse its discretion by denying Shawn's section 388 petition. In his petition, Shawn alleged there had been a failure to disclose the extent of Ruth's mental illness, and his fundamental rights had been violated. On appeal he argues circumstances had changed since the September 25, 2007 hearing in that he had not had contact with the children, he was no longer in conjoint therapy with them, the children had not been in therapy for some time and their attitude toward him had gotten worse. The record shows some of these problems were Shawn's own fault. He had not attempted to schedule visits with the children, had called them only one time and decided not to have conjoint therapy with them. Also, by the time of the hearing, the children had resumed individual therapy.

Moreover, the court did not err by finding Shawn did not show that granting his request to remove the children from Ruth's custody and place them with him would be in their best interests. The children testified they did not want to live with Shawn and wanted to stay with Ruth. They said they believed she had improved her parenting style through therapy, and they were happy in her home. They blamed Shawn for the fact that the case was continuing, and they longed to live normal lives. Their CASA reported they were doing well in school, attending therapy and appeared to be content. She said the

children believed Shawn was the person who had kept their lives in an uproar for three years. She opined if they were placed anywhere they did not want to be, they would sabotage the placement. The court reasonably determined that placement with Shawn would not serve their best interests. Shawn has not shown an abuse of the court's discretion.

II. *The Court's Order Granting Sole Legal and Physical Custody to Ruth*

Shawn contends the court erred by granting sole legal and physical custody to Ruth because Ruth has poor parenting skills, unresolved mental health problems and a history of having the children make false accusations against him.

A juvenile court may issue custody and visitation orders when it terminates its jurisdiction over a child. (§ 362.4.) These orders are subject to review under an abuse of discretion standard. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) "[W]hen a court has made a custody determination in a dependency proceeding, 'a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination . . .'" (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

The court is called upon to judge the credibility of witnesses and make determinations regarding conflicting evidence. On review, we do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. (*In re S.C.* (2006) 138 Cal.App.4th 396, 415.)

Shawn has not shown an abuse of the court's discretion in granting legal and physical custody to Ruth. The children testified they wanted to live with Ruth. They

were happy there, were doing well in school and the family was in therapy and dealing with problems as they arose. Alex testified he was not being disciplined inappropriately. The social worker reported Ruth expressed willingness to accept responsibility for her past role in causing problems for the children, and she had made changes in her attitude and behavior. Ruth testified she no longer allowed Shawn's comments or conduct direct her actions, she would no longer talk about him in the children's presence and she would allow them to have whatever relationship with him they chose.

Shawn has not shown an abuse of the court's discretion. He has the option of seeking modification of the custody orders in the family court in the future. (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 714.) "The family law court is better suited to handling issues related to custody and visitation. 'This is part and parcel of the family law court's role.' " (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1382.)

III. *The Court's Order Terminating Juvenile Court Jurisdiction*

Shawn maintains the court erred by terminating jurisdiction. He argues Ruth and the children continue to need treatment, and he faults the court for not stating the factual basis for its termination order.

Shawn forfeited this argument because his position at the hearing was for the court to terminate juvenile court jurisdiction.

"A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.) A "reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.]

. . . [¶] Dependency matters are not exempt from this rule." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.)

After the court denied Shawn's section 388 petition, it discussed with him the matter of terminating the juvenile dependency case:

"The Court: Mr. E[], your position on closing the case today?

"[Shawn]: Juvenile court has consistently proven that they have an agenda that does not include me and there is no benefit to my children to be in this system. They have done more harm than they have good. I would like the --

"The Court: The case closed.

"[Shawn]: So it can go on to a private therapist, and private -- you know, the regular."

Here, Shawn clearly stated he wanted the juvenile dependency case terminated, and he did not object that the court had not stated a factual basis for the termination order. He has forfeited his arguments.

Moreover, substantial evidence supports the order terminating jurisdiction, and the court sufficiently discussed the basis for the order.

Termination of dependency jurisdiction is required unless the social services agency establishes that conditions remain that would justify the court taking jurisdiction of the children. (§ 364, subd. (c); *In re N.S.* (2002) 97 Cal.App.4th 167, 173.) Section 364, subdivision (c) provides that after evidence is presented in a juvenile dependency hearing,

"the court shall determine whether continued supervision is necessary. The court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of

evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (*Ibid.*)

Shawn did not provide any evidence that juvenile court protection of the children continued to be warranted. His arguments cite past actions and past psychological evaluations and do not take into account the testimony of the social worker and the CASA that Ruth is providing acceptable parenting, and the children want to be with her. The court adequately discussed the factual basis for its decision to terminate jurisdiction in that their placement with Ruth was stable, and supervision by the juvenile court was no longer needed. Shawn has not shown error in the court's order terminating juvenile court jurisdiction.

IV. Denial of Shawn's Request for a Continuance

Shawn contends the court abused its discretion when it denied his request to continue the hearing. He argues he identified the documents and witnesses he required, and a slight delay would not have been contrary to the children's best interests.

The juvenile court may grant a continuance only on a showing of good cause. "[T]he court shall give substantial weight to a minor's need for prompt resolution of his or her custody status. . . ." (§ 352, subd. (a).) "Continuances are discouraged [citation] and we reverse an order denying a continuance only on a showing of an abuse of discretion [citation]." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

The court did not abuse its discretion by denying Shawn's request for a continuance. As the court stated, the hearing had been pending for some time, and Shawn knew of the date it was to be held. The court noted there was no evidence that

Shawn had attempted to subpoena his witnesses and subpoenaing witnesses was Shawn's responsibility not the responsibility of the court. Shawn has not shown an abuse of the court's discretion.

DISPOSITION

The orders are affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

NARES, J.